THAYANANTHA RAO BALA KRISHNA v. SJN MUHAMMAD IZWAN IZHAM & ORS

HIGH COURT MALAYA, KUALA LUMPUR
JOHAN LEE KIEN HOW J
[CIVIL SUIT NO: WA-21NCVC-43-07-2020]
21 MAY 2024

Abstract – *The difference between an act and an omission as a legal wrong is that, in the former, a positive act of the defendant causes harm to the plaintiff but in the latter, the inaction on the part of the defendant causes harm to the plaintiff. Omissions may give rise to a duty of care. The law provides three general groups of scenarios where an individual has a duty to act, ie, where the defendant has control of a situation, where the defendant has assumed responsibility and where the defendant has created or adopted a risk.*

TORT: *Negligence – Unlawful arrest and detention – Claim – Claimant unlawfully arrested by police and detained twice – Case of mistaken identity – Wanted person allegedly wrongly used claimant's identity card number – Whether arrests and detentions in accordance with law – Whether police took reasonable steps to update details in database – Whether there were breaches of statutory duties in performance of police function – Whether police had caused claimant to suffer loss and damage – Whether claimant entitled to declarations, reliefs and damages claimed*

TORT: *Misfeasance in public office – Claimant unlawfully arrested by police and detained twice – Case of mistaken identity – Wanted person allegedly wrongly used claimant's identity card number – Whether misfeasance in public office proven*

TORT*: Liability – Vicarious liability – Unlawful arrest and detention – Claim – Claimant unlawfully arrested by police and detained twice – Case of mistaken identity – Wanted person allegedly wrongly used claimant's identity card number – Whether arrests and detentions in accordance with law – Whether police took reasonable steps to put and/or update details in database – Whether there were breaches of statutory duties in performance of police function – Whether Government of Malaysia vicariously liable for actions, conducts and failures of police*

The present case related to the unlawful arrests and detentions of the plaintiff whose identity was exploited by a criminal. The defendants were: (i) the assistant investigating officer ('IO') ('first defendant'); (ii) the patrolling officer who was also the officer who arrested the plaintiff ('second defendant'); (iii) the IO who was also the inspector granting police bail to the plaintiff ('third defendant'); (iv) the officers in charge ('fourth and fifth defendants'); (v) the Inspector-General of Police ('sixth defendant') and (vi) the Government of Malaysia ('seventh defendant'). The events that led to the present action were as per the following: (i) in 2017, the plaintiff was

riding his motorcycle when he was stopped by a police officer and was asked to produce his identity card ('IC'). The plaintiff complied with the request; (ii) upon obtaining the IC, the police officer proceeded to conduct a search in the PDRM database. Shortly after, the plaintiff was informed that the result of the search showed that the plaintiff was wanted by the police for an offence under the Dangerous Drugs Act 1952 ('DDA'). The plaintiff was immediately arrested and brought to the police station for further investigation ('first arrest and detention'); (iii) the plaintiff was later informed that he would be immediately released without charge and/or further investigation as he did not fit the photofit of the wanted person and that the said wanted person, one Mohd Shukri Rao Abdullah ('Shukri Rao'), had wrongly used the plaintiff's IC number. The plaintiff lodged a police report in which he narrated the details of the first arrest and detention and denied any involvement in the offences to which the PDRM database referred to the plaintiff's name and IC number; (iv) fast forward to a year and a half later, in 2019, the second defendant and other police officers, who were carrying out 'Ops Rentap', had approached the plaintiff and asked him to provide his IC. The second defendant then conducted a criminal record search on the plaintiff and he was told that the PDRM database showed that the plaintiff had committed several serious crimes and the plaintiff was wanted by the police for an offence under the DDA. The plaintiff explained to the second defendant that this was a case of mistaken identity and that he had all the details on his mobile phone. This was ignored by the second defendant who then arrested the plaintiff and brought him to the police station ('second arrest and detention'); (v) the plaintiff was remanded for three days and was released on police bail. After his release, the plaintiff conducted a search at the National Registration Department on his IC number and found that no other person bore the same IC number beside himself; and (vi) about a month later, the plaintiff went to the same police station and lodged a police report where he detailed the event of the second arrest and detention and that this was a case of mistaken identity. In the same police report, the plaintiff also requested the police to investigate the matter, in particular on Shukri Rao's misuse of the plaintiff's identity and for the police to clear the plaintiff's name from the PDRM database. Prior to the second arrest and detention, the plaintiff had just begun working as a Grab driver on 6 May 2019. On 9 September 2019, he was informed by Grab that his account had been terminated due to a failed background screening. Further inquiries by the plaintiff led to the discovery that Grab had conducted a criminal record check on the plaintiff and found that he had a 'previous criminal record'. Deprived by the situation, the plaintiff filed this action for: (i) declarations that his arrests and detentions were unlawful, the remand order was wrongfully obtained by the defendants without sufficient cause, the police bail granted was unlawful and that his constitutional rights were infringed; (ii) an injunction to compel the defendant to ensure that the plaintiff and his

IC number would no longer be mistaken for and/or associated with Shukri Rao and/or for offences whether under the DDA or otherwise; and (iii) damages. The defence by the defendants was that the plaintiff's arrests and detentions were lawful and that there was no wrongdoing on their part as they had taken all reasonable and proper steps. Further, the defendants contended that there was no first arrest and detention as there was no record of such arrest in any police station. In relation to the PDRM database, the defendants asserted that: (i) they had taken all adequate or effective measures and/or precaution to ensure that the information in the PDRM database was accurate and there were no errors; (ii) the defendants' system of checking was adequate to ensure that there were no errors in the PDRM database; (iii) the defendants had provided and/or maintained a proper and accurate PDRM database; and (iv) the defendants had protected and safeguarded the plaintiff from arrest and detention based on wrong information in the PDRM database.

Held (allowing claim):

(1) The first defendant's failure to carry out what was assumed would be the most basic and typical investigative practice to check or at least verify the suspect's identity, tantamount to a sheer negligence and breach of statutory duties in the performance of a police function. Following the plaintiff's first arrest and detention and the later finding and release of the plaintiff, the first defendant failed to take reasonable steps to change or amend the PDRM database to ensure that the plaintiff's name was no longer in the system. The first defendant had by omission, negligently left the plaintiff's name and IC on the PDRM database when the first defendant knew very well that the plaintiff was not Shukri Rao and the plaintiff was not in any way, connected to the offences purportedly carried out by Shukri Rao. The first defendant's failure had caused hardship to the plaintiff as he was detained again in 2019 and was remanded for three days. In other words, the second arrest and detention should and would not have happened if the first defendant had done his duty in 2017 and had updated the PDRM database. The first defendant was obliged, in fact compelled by law to investigate into the plaintiff's explanation on mistaken identity. If the plaintiff's explanation was found to be true, then there would be no basis for him to continue the plaintiff's detention and hence the plaintiff must be immediately released unconditionally. (paras 34-35, 39 & 60)

(2) According to s. 117 of the Criminal Procedure Code ('CPC'), before any remand application is made, an investigation must be conducted within the initial 24 hours. The police must record in the investigation diary the investigations carried out within this 24-hour period before a remand application could be approved. In this case, however, the second defendant admitted to not conducting any investigation within the initial

24 hours and subsequently made a remand application 'to seek an extension of time for further investigation' of the plaintiff. This constituted an obvious case of abuse of process. The mere reason of 'for further investigation' was not sufficient to justify the remand order. It was an obvious case of a lackadaisical attitude. Unless there were good and valid grounds for the first defendant to believe that the plaintiff must be kept in police detention as he would otherwise interfere with police investigation or alternatively that he might abscond, there were simply no plausible grounds for the plaintiff to be kept in the police lockup for three days and for a remand order and more so for a 'waran menahan' to be taken and issued against the plaintiff. Further, s. 29 of the CPC could have been utilised to release the suspect on police bail, with/without conditions/guarantors to make certain that the plaintiff be present in court. Yet, this was not done by the first defendant. (paras 81, 82, 104, 114 & 115)

(3) The defendants argued that police officers who are executing a remand order or warrant issued by a Magistrate are provided with protection from civil action while carrying out investigations against the plaintiff. According to them, this protection was specified under s. 32(1) of the Police Act 1967. However, as stated in *Rahaya Salleh v. Nik Mohd Ghazali Nik Zul Azhar & Ors And Another Appeal*, '… neither the police nor the prison authorities enjoy immunity from a civil claim for negligence. So too the personnel in the discharge of their duties.' Thus, the defendants could not conveniently shield their wrongdoings under the Police Act 1967. As public officers, they must be accountable for all their wrongful acts, deeds and negligence and compensate their tortious victims who had suffered losses accordingly. (paras 129-131)

(4) The first to sixth defendants were all police officers, holding public office and were employed by the seventh defendant. The first to sixth defendants were empowered by the position that they held to arrest and keep in detention the plaintiff and the exercise of such power should not have been exercised in excess and/or disregarded altogether. The plaintiff's arrests and detentions could have been avoided altogether if only the defendants had properly and diligently carried out their public duties. It was clear that the plaintiff had established on the balance of probabilities, that the tort of misfeasance in public office had also been committed by the defendants through their handling of this case which had caused the unfortunate suffering of the plaintiff. (paras 136, 140 & 143)

(5) The plaintiff's claim was allowed with costs and the following was ordered: (i) a declaration that the remand order was wrongfully obtained by the defendants without sufficient cause; (ii) a declaration that the police bail was unlawful; (iii) a declaration that the plaintiff's

constitutional rights were infringed; and (iv) global damages of RM250,000. As the defendants had ratified the mistake in the PDRM database and the plaintiff and his IC number were no longer mistaken for and/or associated with Shukri Rao, there was no need for the injunction sought. (para 144)

Case(s) referred to:

Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3) [2001] 2 CLJ 709 HC ***(refd)***

Ang Koon Kau & Anor v. Lau Piang Ngong [1985] 1 CLJ 31; [1985] CLJ (Rep) 24 FC ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor [2020] 2 CLJ 346 HC ***(refd)***

Bohar Singh Khera v. Secretary Of State For The Home Department & Another Appeal [1983] 2 WLR 321 ***(refd)***

Chong Fook Kam & Anor v. Shaaban & Ors [1968] CLJU 23; [1968] 1 LNS 23 FC ***(refd)***

Dasthigeer Mohamed Ismail v. Kerajaan Malaysia & Anor [1999] 6 CLJ 317 HC ***(refd)***

Hashim Saud v. Yahaya Hashim & Anor [1976] CLJU 40; [1976] 1 LNS 40 ***(refd)***

Hashim Saud v. Yahaya Hashim & Anor [1977] CLJU 32; [1977] 1 LNS 32 FC ***(refd)***

Hassan Marsom & Ors v. Mohd Hady Ya'akop [2018] 7 CLJ 403 FC ***(refd)***

In Re Syed Mohammad Syed Isa & Ors [2001] 8 CLJ 247 HC ***(refd)***

Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor [1980] CLJU 199; [1980] 1 LNS 199 FC ***(refd)***

Karpal Singh Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 MLJ 468 ***(refd)***

Lee Cher Joo & Anor v. Mohd Sharif Othman & Ors [2009] 6 CLJ 165 HC ***(refd)***

Mohd Hady Ya'akop v. Hassan Marsom & Ors [2017] 6 CLJ 487 CA ***(refd)***

PP v. Ambika M A Shanmugam [2021] 2 CLJ 522 CA ***(refd)***

PP v. Audrey Keong Mei Cheng [1997] 4 CLJ 702 CA ***(refd)***

Rahaya Salleh v. Nik Mohd Ghazali Nik Zul Azhar & Ors And Another Appeal [2022] 8 CLJ 591 CA ***(refd)***

Reeves v. Commissioner Of Police For The Metropolis [2000] 1 AC 360 ***(refd)***

Saul Hamid Pakir Mohamad v. Inspektor Abdul Fatah Abdul Rahman & Anor [2007] 5 CLJ 93 CA ***(refd)***

Shaaban & Ors v. Chong Fook Kam & Anor [1969] CLJU 170; [1969] 1 LNS 170 ***(refd)***

Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal [2020] 1 CLJ 337 FC ***(refd)***

Wong Swee Chin v. PP [1980] CLJU 138; [1980] 1 LNS 138 FC ***(refd)***

Yogananthy AS Thambaiya v. Harta Pusaka Idris Osman [2020] 6 CLJ 151 FC ***(refd)***

Zaidah Ismail v. Inspektor Rabiatul Adawiayah Mohd Noor & Ors And Another Appeal [2021] 10 CLJ 876 CA ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 20A(1), 23(1), 28(2), (3), 28A, 29, 117, 119, 120, 173, 254, 388(2)

Federal Constitution, art. 5(1), (3), (4)

Internal Security Act 1960 (repealed), s. 73

Police Act 1967, s. 32(1)

For the plaintiffs - Jayananda Rao Simmachalan, Gayathri Chandrakasan & Ho Xin Ying; M/s Rao & Kamal
For the defendants - Syahriah Shapiee; SFC

Reported by Lina E

JUDGMENT

Johan Lee Kien How J:

Introduction

[1] This case relates to unlawful arrest and detention of an unfortunate man namely, Thayanantha Rao a/l Bala Krishna ("the plaintiff") whose identity was exploited by a criminal.

Brief Facts Of The Case

[2] The first defendant is, at all material times, an Assistant Investigating Officer ('IO') with Jabatan Siasatan Jenayah Narkotik, IPD Dang Wangi, Kuala Lumpur.

[3] The second defendant is a patrolling officer at IPD Dang Wangi, Kuala Lumpur. He was the officer who arrested the plaintiff on 10 May 2019, the date in issue.

[4] The third defendant was an IO from Bahagian Siasatan Jenayah Narkotik, IPD Dang Wangi, Kuala Lumpur as well as the inspector granting police bail to the plaintiff.

[5] The fourth and the fifth defendants were the officers in charge of the Police District (OCPD) at IPD Dang Wangi and IPD Brickfields, respectively.

[6] The unfortunate event happened to the plaintiff in 2019. However, to understand the material facts leading to the arrest in 2019, one must know what happened in 2017 when all his nightmare began.

[7] On or about 20 December 2017, as the plaintiff was riding his motorcycle around Jalan Imbi, Kuala Lumpur, he was stopped by a police officer and was asked to produce his national registration identity card ("IC"). The plaintiff complied with the request. Upon obtaining the IC, the police officer proceeded to conduct a search in the police database ("the PDRM database"). Shortly thereafter, the plaintiff was informed that the result of the search showed that the plaintiff was wanted by the police for an offence under the Dangerous Drugs Act 1952 ("the DDA 1952"). Immediately, the plaintiff was arrested. He was brought first to IPD Dang Wangi and at about 7.30pm on the same day, the plaintiff was taken to IPD Brickfields at Sri Petaling, specifically to the Narcotics Division for further investigation ("the first arrest and detention").

[8] At or about 10pm on 20 December 2017, the plaintiff was informed by a police officer that he would be immediately released without charge and/or further investigation as the police had found out that even though the PDRM database did identify the plaintiff's IC as being the person wanted by the police, the plaintiff did not fit the photofit of the wanted person and that wanted person had wrongly used the plaintiff's IC number. The plaintiff was later informed that the wanted person who had purportedly misused his IC was one Mohd Shukri Rao bin Abdullah ("Shukri Rao"). On 22 December 2017, the plaintiff lodged a police report ("the first police report") in which he narrated the details of the first arrest and detention and denied any involvement in the offences to which the PDRM database referred to the plaintiff's name and IC number.

[9] Fast forward, a year and a half later, on 10 May 2019, between 9pm and 9.30pm, the second defendant, together with other police officers who were carrying out 'Ops Rentap' in and around the area of Jalan Khoo Teik Lee, Off Jalan Imbi, Bukit Bintang, approached the plaintiff and asked him to provide his IC. The second defendant then conducted a criminal record search on the plaintiff and was told that the PDRM database showed that the plaintiff had committed several serious crimes and that the plaintiff was wanted by the police for an offence under the DDA 1952. The plaintiff attempted to explain to the second defendant that this was a case of mistaken identity and that he had all the details in his mobile phone. However, this was ignored by the second defendant, who then arrested the plaintiff and the latter was brought to IPD Dang Wangi ("the second arrest and detention"). At IPD Dang Wangi, the second defendant lodged his arrest report, THSL/13274/19 ("the second defendant's arrest report in 2019").

[10] On the second day, 11 May 2019, the Magistrate, upon such application by the first defendant, granted the remand order for three days until 13 May 2019 ("remand order"). On 13 May 2019, the first defendant informed the plaintiff that he would be released on police bail later the same day. The plaintiff was handcuffed and brought to the narcotic department in IPD Dang Wangi to carry out a urine test. Thereafter, the plaintiff's fingerprints were taken and then he was brought to the first defendant's office, where the plaintiff's statement was recorded. Later, the police bail document (surat perjanjian dan jaminan) was given by the third defendant to the plaintiff and his son, acting as the plaintiff's guarantor at that time.

[11] On the day following his release on police bail, the plaintiff conducted a search at the National Registration Department ("JPN search") on his own IC number and found out that no other person bore the same IC number beside himself. About a month later, on 17 June 2019, the plaintiff went to IPD Dang Wangi and lodged a police report THSL/016761/19 ("the second police report") wherein the plaintiff detailed the event of the second arrest and detention and that this was a case of mistaken identity. The plaintiff had

also, in the second police report, requested the police to investigate the matter, in particular on Shukri Rao's misuse of the plaintiff's identity and for the police to clear the plaintiff's name from the PDRM database.

[12] Later, the plaintiff met the first defendant, wherein he was informed that no further date would be fixed for the plaintiff under the police bail and that the first defendant would inform him if there were any changes.

[13] Prior to the second arrest and detention, the plaintiff had just begun working as Grab driver on 6 May 2019. On 9 May 2019, he was informed by Grab that his account had been terminated due to a failed background screening. Further inquiries by the plaintiff led to the discovery that Grab had conducted a criminal record check on the plaintiff and found that he had a 'previous criminal record'.

[14] Deprived by the situation, the plaintiff filed this suit ("this action") for, *inter alia*:

(i) a declaration that the plaintiff's arrest and detention on 20 December 2017 and 10 May 2019 were unlawful;

(ii) a declaration that the remand order dated 11 May 2019 was wrongfully obtained by the defendants without sufficient cause;

(iii) a declaration that the police bail granted on 13 May 2019 to the plaintiff was unlawful;

(iv) a declaration that the plaintiff's constitutional rights were infringed;

(v) an injunction to compel the defendants within seven days from the court's order so as to ensure that the plaintiff and his identity card number are no longer mistaken for and/or associated with that Mr Shukri Rao and/or for offences whether under the Dangerous Drugs Act 1952 or otherwise; and

(vi) damages.

The Plaintiff's Case

[15] The crux of the plaintiff's case is that the plaintiff's arrests and detentions by the defendants were wrongful and unlawful.

The Defendants' Case

[16] In essence, the defence put up by the defendants is a simple and straightforward one: that the plaintiff's arrest and detention was lawful and in accordance with the law. It is also the defendants' case that the defendants had taken all reasonable and proper action and there was no wrongdoing on their part. In particular, the defendants contended that there was no first arrest and detention as alleged since there is no record of any arrest report in any police station.

[17] In relation to the PDRM database, the defendants had asserted, *inter alia* that:

(i) they had taken all adequate or effective measures and/or precautions to ensure that the information in PDRM database is accurate and there are no errors;

(ii) the defendants' system of checking is adequate to ensure that there are no errors in PDRM database;

(iii) the defendants have provided and/or maintained a proper and accurate PDRM database; and

(iv) the defendants have protected and safeguarded the plaintiff from arrest and detention based on wrong information in PDRM database.

The Trial

[18] The plaintiff called upon three witnesses during trial. They were:

(i) SAC Abd Rahman bin Atan (SP1).

(ii) Thayanantha Rao a/l Bala Krishna (SP2).

(iii) Devinthra Rao a/l Thayanantha Rao (SP3).

[19] Meanwhile, the defendants' witnesses were:

(i) Kpl Hamdan bin Jamaludin (SD1)

(ii) Sjn Muhammad Izwan bin Izham (SD2)

[20] As agreed by parties prior to the trial, the following were the issues to be tried in this action:

(i) whether the second defendant had detained the plaintiff in accordance with the law;

(ii) whether the defendants took reasonable steps to put and/or update the details in the police database;

(iii) whether the first, second and/or third defendants had contravened, violated and/or breached, *inter alia,* their statutory duties, the Federal Constitution and the rules of natural justice when they arrested and detained the plaintiff;

(iv) whether the first, second and third defendants (who were under the control and supervision of the fourth and sixth defendants) had committed tort of misfeasance;

(v) whether the seventh defendant is vicariously liable for the actions, conducts and failures of the defendants;

(vi) whether the defendants, by their conduct and actions, had caused the plaintiff to suffer loss and damage; and

(vii) whether the plaintiff is entitled to the declarations, reliefs and damages as claimed.

Decision And Findings Of The Court

[21] After perusing the evidence and testimonies rendered throughout this action and the submissions and replies by the parties, I allow the plaintiff's claim with global damages of RM250,000. Herein are my reasons.

Burden Of Proof

[22] The law is crystal clear that where the case rests on unlawful detention, the cardinal principle is that every detention is *prima facie* unlawful and the burden of proof lies on the detainer to justify it (see *Johara Bi Abdul Kadir Marican v. Lawrence Lam Kwok Fou & Anor* [1980] CLJU 199; [1980] 1 LNS 199; [1981] 1 MLJ 139, *Bohar Singh Khera v. Secretary Of State For The Home Department & Another Appeal* [1983] 2 WLR 321 which was followed in *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3)* [2001] 2 CLJ 709; [2001] 2 MLJ 689). Bearing this in mind, I have analysed the plaintiff's case here based on the following:

(i) negligence and breach of duty of care and statutory duties;

(ii) breach of natural justice and CPC provisions; and

(iii) misfeasance in public office.

Negligence And Breach Of Duty Of Care And Statutory Duties

[23] The plaintiff has listed down numerous claims against all the defendants. These are the main claims against the first defendant:

(i) he was negligence when he failed to exercise due care in his investigation into the report in 2017 ("Chow Kit report"), which, in no uncertain terms, directly caused and led to the plaintiff's wrongful and unlawful second arrest and detention; and

(ii) he had contravened and violated statutory duties, the provisions of the Criminal Procedure Code ("CPC") and the Federal Constitution ("FC") during the period of the plaintiff's second arrest and detention.

[24] That is to say, the plaintiff's second arrest and detention in 2019 had its origin in the action and conduct of the first defendant back in July 2017, where in the course of his investigation into the Chow Kit report, the first defendant had failed to correctly identify the suspect in the Chow Kit report.

[25] The plaintiff further submitted that even though the suspect in Chow Kit report arrested on 7 July 2017 by Insp Zakaria bin Anas had on three separate occasions, identified himself as 'Mohd Shukri Rao bin Abdullah' ("Shukri Rao") to three different persons and it was noted on three different official documents that the suspect was this Shukri Rao, the first defendant had nevertheless recorded in his investigation paper ("Chow Kit IP") that the suspect arrested on 7 July 2017 was Thayanantha Rao a/l Bala Krishna, namely the plaintiff in this case.

[26] This argument brings us to three important documentary evidence mentioned earlier. The first of these is the Chow Kit report lodged by Insp Zakaria bin Abas on 7 July 2017 (p. 31 of B1), where the suspect had verbally identified himself as Mohd Shukri Rao bin Abdullah.

[27] The second document here is the police document (Pol.R.J.2) containing the suspect's fingerprints taken by L/K Mohd Faiz on 7 July 2017 (p. 59 of B1) where again, the name of the suspect in the said document was identified as Shukri Rao.

[28] Thirdly, the Magistrate remand minutes dated 8 July 2017 (p. 20 of B1), where it was clearly shown that the name of the suspect, as recorded by the Magistrate, was Mohd Shukri Rao bin Abdullah.

[29] Despite all of these documents mentioned above, the first defendant had recorded the plaintiff's name "Thayanantha Rao a/l Bala Krishnan" as the suspect's name instead of "Mohd Shukri Rao bin Abdullah". This can be seen in the borang hak-hak orang ditangkap (s. 28A Kanun Tatacara Jenayah) (p. 28 of B1, encl. 55) and surat pemberitahuan YBGK (p. 29 of B1, encl. 55), both dated 7 July 2017, which were signed by the first defendant.

[30] In his testimony during trial, the first defendant had candidly testified that even though his investigation into the Chow Kit report was completed and charges had been preferred against the suspect, Shukri Rao in 2017, he did not, at any point, take any steps to properly identify the suspect in the Chow Kit report and at all times, had recorded the name of Thayanantha Rao a/l Bala Krishna as the suspect in the Chow Kit IP. (See NOP, p. 97).

JR Tujuh belas. Anda mempunyai kad memeluk agama Islam suspek dalam IP 2017. Ini keterangan anda ya. Anda mempunyai keempat-empat dokumen yang saya rujuk kepada anda berkaitan dengan tangkapan Chow Kit 2017. Soalan saya kepada anda. Setuju dengan cadangan saya, terdapat nama-nama yang berbeza dimasukkan ke dalam keempat-empat dokumen yang telah saya rujuk kepada anda tadi, iaitu dua dokumen official yang masuk Mahkamah adalah Mohd Shukri Rao Abdullah, dua dokumen penyediaan anda adalah Thayanantha Rao, setuju?

SD2 Setuju.

JR Sebagai seorang anggota polis, lebih lebih lagi sebagai seorang IO, Sarjan, adakah anda membuat sebarang siasatan lanjut mengapa nama-nama ini berubah-ubah. Atau kamu hanya mengambil dasar dia dah memeluk Islam, nama lama dan nama baru, saya boleh ulang-ulang pakai?

SD2 Soalannya?

JR Soalan dia. Kita dah tahu dah, ada dua nama bagi satu suspek. Dokumen tadi jelas iaitu pemberitahuan YBGK oleh anda, hak untuk tangkap oleh anda, Chow Kit Repot, nama tangkapan adalah Thayanantha Rao. Betul?

SD2 Betul.

JR Betul ya? Lepas tu, kita ada laporan tangkapan suspek Chow Kit Repot mengatakan bahawa nama lisan adalah Shukri Rao Abdullah, setuju?

SD2 Setuju.

JR Dan kamu telah rujuk kepada reman kes ini di mukasurat 30. Ini adalah dokumen Mahkamah. Nama bukan Thayanantha tapi Shukri Rao.

SD2 Betul.

[31] It is worth noting at this juncture that the first defendant had testified that the PDRM database is linked to JPN, KWSP and SPR's systems and that a JPN search can be done "on the spot". (See NOP, p. 79).

JR Dan Sarjan, setuju dengan saya bahawa sistem PDRM juga terikat dengan sistem JPN, sistem KWSP dan sistem SPR?

SD2 Setuju Tuan.

JR Jadi apa jua carian JPN boleh dilakukan on the spot?

SD2 Setuju Tuan.

[32] Therefore, despite such instantaneous search tools available, the evidence shows that the first defendant made no attempt to verify and ratify the suspect's actual and correct identity. After a thorough perusal on the printout of the PDRM database (p. 102 of B1, encl. 55), it bears emphasis that the plaintiff's photograph in the PDRM database is in no way resembles the photograph in Shukri Rao's 'kad muallaf' (p. 112 of B1, encl. 55). A simple glance at the two documents would immediately spot the glaring mistaken identity here.

[33] The plaintiff further submitted that after the plaintiff's second arrest and detention, the first defendant again failed to check the Chow Kit IP containing Shukri Rao's police photograph and compared it with the PDRM database (that was linked to the JPN search), which would show a photograph of the plaintiff. If only this was done, it would be obvious as to who was indeed the suspect in the Chow Kit report and the plaintiff would never be wrongfully detained and arrested. (See NOP, p. 117).

JR Jadi apa yang anda sedang bagitahu di Mahkamah walaupun seseorang itu adalah seseorang yang tak bersalah, anda tak boleh tahu betul tak betul orang itu adalah pesalah tepat atau tidak kerana maklumat tidak ada dalam sistem PDRM.

SD2 Betul.

JR Jadi, kalau macam itu Sarjan, siapa-siapa akan mengalami risiko di atas tangkapan salah, setuju?

SD2 Setuju.

[34] Based on the above, I am in agreement with the plaintiff that the first defendant's failure to carry out what we assume would be the most basic and typical investigative practice to check or at least verify the suspect's identity, tantamount to a sheer negligence and breach of statutory duties in the performance of a police function.

[35] In other words, following the plaintiff's first arrest and detention and the later finding and release of the plaintiff, the first defendant had failed to take reasonable steps to change or amend the PDRM database to ensure that the plaintiff's name was no longer in the system. I am of the view that the first defendant had, by omission, negligently left the plaintiff's name and IC on the PDRM database when the first defendant knew very well that the plaintiff was not Shukri Rao and the plaintiff was not in any way connected to the offences purportedly carried out by Shukri Rao.

[36] I will now delve into the cardinal issue in this case, that is, whether the act of the first defendant in not updating the PDRM database upon the plaintiff's first arrest and detention is legally wrong.

[37] In this case, the first defendant was the police officer responsible for conducting an investigation into the plaintiff's first arrest and detention. However, the plaintiff premised that he had breached his duty as a police officer by failing to update the PDRM database after discovering that the plaintiff was not identical to the individual named Shukri Rao.

[38] The first defendant also knew that the crook named Shukri Rao had used the plaintiff's identification number for deceptive purposes and was aware of the existence of police investigation papers on the said Shukri Rao before but had failed to use his authority and responsibility to investigate more thoroughly and subsequently update the PDRM database.

[39] The first defendant's failure has caused hardship to the plaintiff, as he was detained again in 2019 and was remanded for three days. In other words, the second arrest and detention should and would not have happened if the first defendant had done his duty in 2017 and had updated the PDRM database.

[40] After a thorough analysis of the entire spectrum of information presented before this court, the defendants argued that the plaintiff's second arrest and detention in 2019 was carried out in accordance with the law. The second defendant testified that he made a phone call to check the criminal records with the IPD Dang Wangi Control Centre. The results revealed that the plaintiff's IC number had eight previous records. The plaintiff also has one outstanding record wanted by the police related to Chow Kit report for a drug offence. Hence, the defendants contended that the existence of the report itself is sufficient evidence that the detention requirement has been met (see *Lee Cher Joo & Anor v. Mohd Sharif Othman & Ors* [2009] 6 CLJ 165, *Shaaban & Ors v. Chong Fook Kam & Anor* [1969] CLJU 170; [1969] 1 LNS 170, *Saul Hamid Pakir Mohamad v. Inspektor Abdul Fatah Abdul Rahman & Anor* [2007] 5 CLJ 93).

[41] On this issue, I am guided by the apex court's judgment in *Hassan Marsom & Ors v. Mohd Hady Ya'akop* [2018] 7 CLJ 403; [2018] 5 MLJ 141, where Balia Yusof FCJ explained:

> [36] Before the learned JC too, the issue of whether the arrest was lawful or otherwise was never dealt with. Focus was given more to the detention itself. Be that as it may, we are in agreement with the Court of Appeal that *whether there was wrongful arrest or not depends on whether the police had reasonable or probable cause to effect the arrest on the respondent which depends on whether the police had credible information or held reasonable suspicion as to the commission of the offence.* The case of *Masa ak Nangkai & Ors v. Sgt Edwin Nancha & Anor* [2004] 1 LNS 495; cited in the Court of Appeal's judgment explains the requirements of s. 23 of the Criminal Procedure Code on such power of arrest by the police. (See also: *Saul Hamid Pakir Mohamad v. Inspektor Abdul Fatah Abdul Rahman & Anor* [1999] 1 LNS 83.)
>
> (emphasis added)

[42] Hence, the question of whether there was wrongful arrest and detention would very much depend on whether the police had reasonable or probable cause to effect the arrest in that they had received credible information or held a reasonable suspicion as to the commission of an offence.

[43] Referring to the cases above, the police can only detain the plaintiff if they have credible information or reasonable suspicion that the plaintiff has committed an offence. However, in this case, the initially credible information was based solely on the identification number, which was later revealed by the defendants themselves to be a case of mistaken identity, as the individual named Shukri Rao had intentionally used the plaintiff's identification number for deceptive purposes. The first defendant knew this all along and had neglected to do anything in 2017 and in 2019.

[44] The first defendant should have immediately updated the police database in 2017 upon receiving this information to prevent a repeat or reoccurrence of the wrongful arrest. Unfortunately, the first defendant failed to do so, and this police's failure had resulted in yet another detention of the plaintiff in 2019, subsequently causing trauma to the plaintiff and affecting his life and liberty.

PDRM Database

[45] The defendants have raised two significant points concerning the record in the PDRM database. First, they questioned the rationale for the plaintiff to only name the first and second defendants in the action when the PDRM database printout (p. 102 of encl. 55) shows that there were multiple other instances where the plaintiff has been mistakenly identified in police cases from 2011. Secondly, the defendants alleged that the plaintiff himself is at fault for not following up on his police report.

[46] The plaintiff rebutted this by stating that he is entitled by law to file a case against whoever he wishes, subject only to the proviso that there is a valid cause of action and that there is sufficient proof to support his case. As for the second point on the issue of the plaintiff's fault, the plaintiff's counsel submitted that this issue was never pleaded by the defendants in their defence and thus could not be relied upon by them.

[47] It is the view of this court that the plaintiff's failure to follow up on the police report lodged by him does not absolve the first and second defendants from any liability. After all, s. 120 of the CPC states that every police investigation shall be completed without unnecessary delay and it is abhorrent if the plaintiff could be blamed for not following up on the report when the duty and burden lies on the police to complete their investigation without delay.

Wrongful Issuance Of RJ10A Notice

[48] I will now deal with the integral issue of the wrongful issuance of RJ10A notice, which the plaintiff claimed had led to the plaintiff's second arrest and detention.

[49] It is apt to note that in the course of cross-examination, it appears that the Magistrate hearing the case against Shukri Rao for the Chow Kit report had ordered a discharge not amounting to an acquittal (DNAA) as the chemist report and exhibits could not be furnished to the court in time. Following this, the Deputy Public Prosecutor had given instructions for Shukri Rao to be re-charged. (See NOP, pp. 102 and 103).

SD2 Sebab barang kes dan laporan kimia belum terima, Mahkamah telah DNAA kan kes.

JR Ok. Alright. Jadi, di atas Mahkamah melepaskan tanpa membebaskan suspek ketika itu akibat kelewatan kehadiran barang kes ke Mahkamah, tanpa salah Shukri Rao bin Abdullah, anda telah memasukkan nama dia sebagai wanted. Ataupun anda telah berusaha untuk mencari sampai dia tak dapat?

SD2 Sampai dia tak dapat, maksud?

JR Dia dilepaskan secara sah.

SD2 Betul.

JR Dia tak lompat jamin. Dia tak hadir Mahkamah bukan dia tu. Ertinya dia dilepaskan tanpa dibebaskan.

SD2 Betul.

JR Di bawah Kanun Acara Jenayah. Soalan saya kepada anda, di atas dasar apa, anda telah masukkan nama dia sebagai wanted?

SD2 Atas arahan tuduhan semula oleh YA Timbalan Pendakwa Raya.

JR Alright. Kalau tuduh semula, tak dapat cari dia?

SD2 Tak dapat cari, maksudnya?

JR Bila arahan dah keluar untuk tuduh dia semula, kamu mesti ada ambil langkah-langkah untuk mengesan Shukri Rao bin Abdullah.

SD2 Betul. Melalui penciptaan wanted person.

[50] In his own accord, and without first checking Shukri Rao's name and address neither through JPN records nor the address stated in the 'kad muallaf', the first defendant testified that he proceeded to issue the RJ10A notice against the plaintiff, publishing and broadcasting it in the PDRM database for all police officers throughout Malaysia to be notified that the plaintiff was wanted in relation to the Chow Kit report. (See NOP, pp. 103 to 106).

JR Bila arahan dah keluar untuk tuduh dia semula, kamu mesti ada ambil langkah-langkah untuk mengesan Shukri Rao bin Abdullah.

SD2 Betul. Melalui penciptaan wanted person.

JR Lagi wanted. Mengapa tak panggil dia? Nombor telefon, atau apa-apa dalam IP, sudah tentu ada siasat.

SD2 OKT merupakan "gedendangan".

JR Come again, sorry?

SD2 OKT, orang yang kena tangkap, Shukri Rao merupakan "gededangan", tiada tempat tinggal, tiada pekerjaan tetap, tiada membeli phone dan tiada.

JR So, tiada apa-apa maklumat langsung pasal Shukri Rao bin Abdullah.

SD2 Tiada data.

JR At least tanya boss.

SD2 Dia tak kan bagi.

JR That. Itu saya tak dapat. Saya faham. I totally understand ya. Kita beralih kepada soalan yang lain. Ok sekarang ini, balik kepada soalan kita, *memandangkan anda telah memasukkan nama Plaintif sebagai wanted, setuju anda memasukkan nama orang salah, identiti orang salah sebagai wanted iaitu nama Plaintif dalam sistem?*

SD2 *Setuju.*

JR Sarjan, hanya kita tuju balik kepada jawapan anda.

Anda kata ini Shukri Rao Abdullah ini apa encik, saya kata nama yang terpakai tadi tu, saya tak faham nama dia, dia ni memang tak ada apa-apa identiti ataupun tak ada pengenalan, tak ada tempat tinggal, tak ada nombor kerja, tak ada nombor telefon. Apa nama yang dia panggil?

SD2 Gelandangan.

...

JR Alright. Rujuk kepada mukasurat 28 sekali lagi, Sarjan..

Ia itu tandatangan di atas, di bawah Thayanantha Rao. Itu adalah tandatangan Shukri Rao?

SD2 Betul, setuju.

JR Bukan tandatangan Plaintif ya?

SD2 Betul.

JR Dan segala siasatan ini, bukan terhadap Encik Thaya.

(emphasis added)

[51] Thus, in the first place, there was no legal basis for RJ10A notice to be issued against Shukri Rao, considering the fact that at all material times, Shukri Rao had been legally and by order of the court given a discharge not amounting to acquittal. Even if there was such legal basis, by his own testimony, the first defendant had never taken any steps to try to locate Shukri Rao before issuing the RJ10A notice. He claimed that the suspect (Shukri Rao) was homeless. Ironically, this was done despite the fact that the plaintiff's address was in Kajang (as per JPN search) and the address stated in Shukri Rao's kad muallaf was in Sungai Besi, Kuala Lumpur. Besides, as shown in the PDRM database, Shukri Rao had been convicted in relation to Sri Petaling Report 011016/17 sometime in 2017 and was likely in jail or under rehabilitation or supervision by the Agensi Dadah Kebangsaan (AADK) at all material time.

[52] Most bizarre of all, all the documents shown that the culprit involving in the drug abuse is "Shukri Rao". Even the record in the Magistrate shown this. There is no basic for the first defendant to record and to key in the plaintiff's name in the wanted list! As noted in the notes of proceeding stated above (and emphasised), the first defendant had admitted that he had done it wrongly.

[53] Hence, it can be said that the blunder act of the first defendant's issuance of the RJ10A notice in the PDRM database had caused a grave injustice to the plaintiff, and as a consequence thereof, had led to the plaintiff's second arrest and detention by the second defendant. What is more intriguing is not only the wrong issuance of RJ10A notice stating the plaintiff's name, but also, the first defendant and the second defendant's blatant ignorant of the plaintiff's plea to check the details he had saved in his mobile phone regarding the wrongful arrest and the wrongful identity during the second arrest and detention.

Failing To Take Cognisance Of The Plaintiff's Explanation Of Mistaken Identity

[54] I shall now discuss the issue of whether the second defendant's and also the first defendant's inaction to investigate the plaintiff's explanation of mistaken identity amounts to a breach of duty of care.

[55] It is apt to note that the difference between an act and an omission as a legal wrong is that in the former, a positive act of the defendant causes harm to the plaintiff, but in the latter, inaction on the part of the defendant causes harm to the plaintiff. The general principle is that a person must not harm others, but at the same time, he does owe a duty of care to do something for the benefit of another. There are, however, instances where omissions may give rise to a duty of care. The law provides three general groups of scenarios where an individual has a duty to act – where the defendant has control of a situation, where the defendant has assumed responsibility, and where the defendant has created or adopted a risk.

[56] Control situations arise where a defendant has a high degree of control over an individual (and thus is held as owing a duty to exercise that control responsibly. In *Reeves v. Commissioner Of Police For The Metropolis* [2000] 1 AC 360, the police were held responsible after an inmate on suicide-watch was able to kill himself, after the custody officer left the hatch open on his cell, allowing the inmate to attach his shirt and use it as a noose. This involved an omission (to close the hatch), but because the police had control over the cells, they had a duty to act.

[57] In essence, one can ask 'who is in charge?' when looking for a control situation. If the answer to that question is 'the defendant', then this will be a control situation.

[58] During the trial, the plaintiff testified that he had informed not just the arresting officer, the second defendant, but also the other police officers in IPD Dang Wangi, that this was a case of mistaken identity. He continued by mentioning that he had been previously arrested in 2017 but released afterwards after the police found out that someone had unlawfully misused his identity. (See PWS2, pp. 4 to 6). He had informed them that all the information/documents were in his mobile phone. His plea for them to take a look at his mobile phone was, however, totally ignored!! It is undeniable that despite the continuous explanation uttered by the plaintiff, the second defendant did nothing to investigate or at least verify the matter. This is further fortified by the fact that the plaintiff's testimony was never challenged by the defendants during the trial. Moreover, the defendants had also failed to challenge the evidence of SP3, the plaintiff's son, who gave testimony that those documents which proved the mistaken identity had been showed to the first defendant on 11 May 2019 (which the first defendant did not take). The same documents were subsequently given by SP3 to the first defendant on 13 May 2019. The law is trite that the failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of a witness' testimony. (See *Wong Swee Chin v. PP* [1980] CLJU 138; [1980] 1 LNS 138; [1981] 1 MLJ 212). Hence, this part of the evidence had been properly established.

[59] The first defendant in his witness statement admitted that he had received a phone call from a man, claimed to be the plaintiff's family, who had pleaded for the first defendant to release the plaintiff as he never committed any offence. The first defendant then replied he had to inform his superior and the latter had instructed the first defendant to investigate the matter. (See DWS1 p. 3).

S7 Selepas Permohonan Reman selesai apa yang berlaku?

J Pada 11.05.2019, jam lebih kurang 4.30 petang, *saya telah menerima panggilan telefon dari seorang lelaki yang mengakui saudara Plaintif dan meminta supaya Plaintif dibebaskan kerana Plaintif tidak pernah terlibat dengan mana-mana aktiviti jenayah.* Saya, memaklumkan bahawa siasatan lanjut perlu dijalankan terhadap Plaintif dan permohonan reman Plaintif selama tiga hari telah pun diperolehi.

S8 Apa yang berlaku selepas itu?

J Saya kemudian telah memaklumkan perkara berkenaan kepada Ketua Bahagian Siasatan Jenayah Narkotik Daerah Dang Wangi DSP Zahari bin Mohamed Noor dan telah memberi panggilan telefon 'ASP KARTHI" kepada beliau. *Arahan beliau selanjutnya, KBSJND meminta saya supaya menjalankan siasatan selanjutnya untuk menentukan kesahihan maklumat dari 'ASP KARTHI' tersebut.*

(emphasis added)

[60] Thus, this court is of the view that the first defendant was obliged, in fact compelled by law, to investigate into the plaintiff's explanation of mistaken identity. If the plaintiff's explanation was found to be true, then there would be no basis for him to continue the plaintiff's detention at IPD Dang Wangi, and hence, the plaintiff must be immediately released unconditionally.

[61] Yet, as explained during cross-examination, the first defendant did not immediately investigate the matter. Nor did he investigate the truth of the information given by the plaintiff and SP3 concerning mistaken identity. The first defendant testified during the trial that he did not investigate whether the correct suspect was arrested but rather who ASP Karthi was. (See NOP, p. 122).

[62] Now that the first defendant had bunch of information in his hand, (the JPN search and the plaintiff's first police report given by the plaintiff and SP3 and the plaintiff's explanation that this was a case of mistaken identity), all he needed to do was to check the Chow Kit IP to see if the plaintiff was the correct suspect. He could also check to see if the plaintiff matched Shukri Rao's police photograph taken upon his arrest in 7 July 2017. Besides, he could check to see if the plaintiff's fingerprints matched that of Shukri Rao. Otherwise, he could verify whether the correct suspect had been arrested for the Chow Kit report. After all, all these documents were in his custody and possession as the IO and the custodian of the Chow Kit IP. It was him who 'wrongfully' entered and keyed in the plaintiff's name in the PDRM database and issued the RJ10A notice and listed the plaintiff as 'wanted' in 2017!

[63] However, the first defendant did none of the above. The first defendant claimed that he could not get his hands on the Chow Kit IP since it was locked in a room, and the keys were in the hands of the IP warden, who was a clerk that only worked during office hours. (See NOP, p. 138).

JR Kalau begitu, adakah bilakah anda telah mendapatkan kertas siasatan?

SD2 Pada hari Isnin.

JR Mengapa pada hari Isnin?

SD2 Sebab kertas siasatan disimpan di pejabat IP Warden.

JR Di mana?

SD2 Di pejabat.

JR Siapa IP Warden.

SD2 Kerani awam yang uruskan pengurusan IP.

JR Walaupun ada seorang suspek yang menyatakan saya bukanlah orang yang sebenar membuat kesalahan, tolonglah periksa aduan saya. IP adalah di bawah pengelolaan anda, anda merupakan pegawai penyiasat IP tersebut, mengapa anda mengambil tiga hari untuk mengesahkan pengesahan Plaintif?

SD2 Sebab nak melalui IP Warden.

[64] I find this explanation unreasonable and flies against the entire purpose and object of s. 28(2) of the CPC. It is preposterous for the first defendant to claim that they cannot investigate during weekend, or they cannot get their hands on the IP during weekends. After all, the price of an individual's liberty and freedom was at stake here.

Conduct Post-Second Arrest And Detention

[65] While the second arrest and detention in 2019 in itself was merely a routine operation, and I have no issue with its validity, the conduct of the defendants (in particular the first defendant and the second defendant) before, during and after the arrest is the main focus here.

[66] It is undisputed facts that the second defendant was the arresting officer of the plaintiff for the second arrest and detention and the maker of the second defendant's arrest report in 2019. It is the plaintiff's case that the second defendant had breached his statutory duties and common law duty of care when he:

(i) conducted a body search for the plaintiff before arrest, in contravention to s. 20A(1) of the CPC;

(ii) failed to inform the plaintiff of his rights to inform his family of his whereabouts and his right to consult legal practitioner as envisaged in art. 5(3) of the FC and s. 28A of the CPC;

(iii) failed to perform his common law and statutory duties as a police officer.

[67] The defendants have sought to allege that the plaintiff had failed to plead the specific statutory provisions breached by the second defendant and the third defendant and further alleged that the plaintiff does not fall under any class of persons who are protected.

[68] As for the first allegation, I disagree with the defendants. A thorough perusal of the plaintiff's statement of claim showed that there was sufficient particularity as to the provision of law, under which the plaintiff alleges were breached and contravened by each of the defendants (paras. 38 to 40A of the plaintiff's statement of claim).

[69] Besides, it is trite law that any issue not pleaded may be allowed if the issue not pleaded was nevertheless freely ventilated by parties without objection (see *Ang Koon Kau & Anor v. Lau Piang Ngong* [1985] 1 CLJ 31;

[1985] CLJ (Rep) 24; [1984] 2 MLJ 277 and *Yogananthy AS Thambaiya v. Harta Pusaka Idris Osman* [2020] 6 CLJ 151; [2020] 5 MLJ 455). Hence, even if the particulars in the pleading were lacking as claimed, the defendants had not by any means during the trial raised any objection regarding this. Hence, it is a non-issue here.

[70] As submitted by the plaintiff, the Federal Counsel's argument that the first and second defendants do not owe a specific statutory duty to the plaintiff was misconstrued and had ignored the very purpose of the enactments of the CPC. The plaintiff asserted that the first defendant, in his performance of his police duties, also committed grave breaches of s. 28A of the CPC and the law which provisions were enacted primarily to safeguard a person's liberty as guaranteed by art. 5(1) of the FC. The Federal Court had, in the case of *Hashim Saud v. Yahaya Hashim & Anor* [1977] CLJU 32; [1977] 1 LNS 32; [1977] 2 MLJ 116, thoroughly discussed the issue on the right to consult a lawyer under s. 117 of the CPC.

[71] In similar veins, in *Hassan Marsom & Ors* (*supra*), the apex court held that in considering an application for a remand order, a Magistrate must balance fairly between the right of a personal liberty of an individual who has not been proven guilty of an offence, against the equally important public interest *vis-à-vis* the duty of the police to investigate crimes. It involves an exercise of discretion and that discretion must be exercised judicially and is subject to the court's scrutiny (see also *Hashim Saud v. Yahaya Hashim & Anor* [1976] CLJU 40; [1976] 1 LNS 40; [1977] 1 MLJ 259 and *Chong Fook Kam & Anor v. Shaaban & Ors* [1968] CLJU 23; [1968] 1 LNS 23; [1968] 2 MLJ 50).

[72] The plaintiff in his witness statement testified that he was not informed of his right to inform his family of his whereabouts nor of his rights to consult with a legal practitioner of his choice. The plaintiff's evidence was not challenged by the defendants during the trial. No question was posed to the plaintiff during cross-examination on this. The plaintiff's counsel further argued that the inequity suffered by the plaintiff becomes more striking when the plaintiff's second arrest and detention was compared with Shukri Rao's arrest in 2017.

[73] The first defendant had, plainly afforded Shukri Rao his s. 28A (of the CPC) rights, Shukri Rao was made to sign a document confirming that he was informed of his rights *vis-à-vis* the borang hak-hak orang ditangkap (p. 28 of encl. 55).

[74] In addition thereto, there is also a document titled pemberitahuan YBGK prepared by the first defendant (p. 29 of encl. 55) that shows that the YBGK had been informed of Shukri Rao's arrest on 7 July 2017. Moreover, the Magistrate's remand minutes (p. 30 of encl. 55) revealed that a representative from YBGK appeared on behalf of Shukri Rao in 2017 during the remand proceeding.

[75] Yet, no such procedure was observed and no documents were prepared by the first defendant in the case of the plaintiff's second arrest and detention and no lawyer or representative from YBGK appeared on behalf of the plaintiff during the remand proceeding.

[76] When the plaintiff's counsel posed the question on the reason such documents were not prepared in 2019, the first defendant had not given any satisfactory answer. (See NOP, p. 129).

[77] The plaintiff postulated that the first defendant had breached s. 28(3) read with s. 117 of the CPC and art. 5(4) of the FC when he failed to carry out any investigation in the first 24 hours of the plaintiff's arrest, which was also candidly and unequivocally admitted by the first defendant during cross-examination. (See NOP, p. 118).

[78] Further, during his cross-examination, the first defendant also testified that even though he was in his office on the night of the plaintiff's arrest, he did not take any steps to meet the plaintiff who was in the lockup.

[79] All he did was to cancel without checking the RJ10A notice record by the penyata pembatalan rekod orang dikehendaki (RJ21) (p. 61 of encl. 55). The record shows that the cancellation was done at 12am, on 11 May 2019. (See NOP, pp. 118 and 119).

JR Sekarang soalan saya, anda tak siasat dalam 24 jam, setuju? Terus masuk dalam lokap untuk reman.

SD2 Setuju.

JR Dan anda telah membuat pembatalan tersebut tanpa mendapat tahu betul tak butiran-butiran orang yang ditangkap itu adalah orang yang tepat, setuju?

SD2 Setuju.

JR Anda tidak mengikut prosedur Kanun Acara Jenayah untuk siasat 24 jam sebelum reman dipohon. Jadi anda secara automatik anggap dah tengah malam dah, saya ambil reman 3 hari uruskan siasatan, setuju?

SD2 Tidak setuju.

JR Jadi mengapa tak jumpa dengan pihak suspek yang ditangkap pada malam itu, sedangkan anda berada dalam pejabat?

SD2 Bahawa DS telah turun ke lokap.

JR Anda ada akses ke lokap?

SD2 Betul.

JR Kenapa tak jumpa dia di lokap walaupun dia di lokap?

SD2 Sebab saya sudah mohon reman dan untuk.

JR Belum lagi mohon reman. Reman belah pagi. Kita tengah malam.

SD2 Itu sebab saya mohon reman untuk jumpa dengan YBS keesokan harinya.

JR Jadi, anda tak jumpa apa-apa untuk mengambil tindakan walaupun anda berada di dalam pejabat sehinggalah hari selepas reman, setuju?

SD2 Tidak setuju, saya ambil tindakan pembatalan rekod.

JR Itu sahaja.

SD2 Betul.

JR Jumpa tertuduh Plaintif langsung tak ada.

SD2 Betul.

JR Sekarang, anda juga telah dalam. Sekarang ini anda kata nak bersiasat, betul? Itu la anda mengambil tempoh reman 3 hari.

SD2 Betul.

[80] Following the first defendant's unequivocal admission that he had not carried out any investigation in the first 24 hours, the plaintiff claimed that the first defendant was not permitted by law to apply for remand under s. 117 of the CPC since the said law is only exercisable if the investigation cannot be completed within 24 hours.

[81] According to s. 117 of the Criminal Procedure Code, before any remand application is made, an investigation must be conducted within the initial 24 hours. The police must record in the investigation diary the investigations carried out within this 24-hour period before a remand application can be approved.

[82] However, in this case, the second defendant admitted to not conducting any investigation within the initial 24 hours and subsequently, made a remand application "to seek an extension of time for further investigation" of the plaintiff. This constitutes an obvious case of abuse of process. If the second defendant had conducted an investigation within the initial 24 hours, a remand application would not have been necessary, and the plaintiff could have been released on the same day.

[83] Mohd Sofian Abd Razak JCA, in the recent Court of Appeal case of *Zaidah Ismail v. Inspektor Rabiatul Adawiayah Mohd Noor & Ors And Another Appeal* [2021] 10 CLJ 876; [2021] MLJU 2109, could not be clearer when he held that:

> [45] *In the circumstances, the 1st Defendant being the investigating officer ought to have objectively analysed the facts to make a proper and valid judgment that it was unnecessary to arrest and detained the 1st Plaintiff.* However, the 1st Defendant had failed to do so, resulting in the unlawful arrest and detention of the 1st Plaintiff. *We find that there was no credible information before the 1st Defendant for any reasonable suspicion to arise that the 1st Plaintiff had committed a seizable*

offence under ATIPSOM, or for that matter under any other statute. Budi was legally in the country with full and valid documents of employment by the 1st Plaintiff. Therefore, it begs the question how the 1st Defendant could have deduced that Budi a person who had been trafficked into the country and thus be an offence for which the powers of arrest under section 29 of Act 670 or section 23 of the Criminal Procedure Code can be exercised. The complaint of alleged assault was made by Budi was against the 2nd Plaintiff, and that too is a non-seizable offence. *We find that no reasonable complaint has been made or credible information has been received or a reasonable suspicion exists for the 1st Plaintiff to be arrested and detained in respect of a seizable offence.* (emphasis added)

[84] Therefore, the second defendant ought to investigate and to objectively analyse the facts to make a proper and valid judgment that it was necessary to arrest and detain the plaintiff. No investigation was done at all until three days later!

[85] The defendants, on the other hand, submitted that the second defendant had reasonable suspicion against the plaintiff as testified during trial. (See NOP, pp. 45 and 46).

FC Ya, yang kuning tu. Saya rujuk Korporal kepada laporan di mukasurat 56 itu, di perenggan pertama selepas OPS Rentap tu, Korporal ada nyatakan 46 lelaki india dalam keadaan mencurigakan. Bolehkah Korporal terangkan kepada Mahkamah apakah yang Korporal maksudkan dalam keadaan mencurigakan.

SD1 Mohon izin YA, sewaktu melakukan rondaan OPS Rentap khas KPD di kawasan rondaan bertarikh tersebut, **kawasan tersebut adalah kawasan 5 paling aktiviti penagihan dadah dan saya jumpa Plaintif di bawah pokok dalam keadaan gelap.** Jadi saya bersama saksi polis buat pemeriksaan lah. (emphasis added)

[86] Despite the fact that the plaintiff had told him about the reports of mistaken identity in his phone, the second defendant had nevertheless arrested the plaintiff without any investigation as he claimed that he had been instructed by his superior, the first defendant, to bring the plaintiff to IPD Dang Wangi (see NOP, p. 59).

[87] Since the first defendant had not even conducted any investigation during the initial 24 hours, the next issue to be dealt with is whether the remand order ("remand order") by the Magistrate was lawful. The plaintiff premised that the first defendant's application for remand as well as the remand order itself was consequently wrongful and unlawful.

[88] I am mindful of the caution given by His Lordship Abdul Wahab Patail J (as he then was) in *Dasthigeer Mohamed Ismail v. Kerajaan Malaysia & Anor* [1999] 6 CLJ 317 (at p. 318) that:

A the courts should apply s. 117 strictly and exercising its discretion to order remand by balancing the demands of convenience of the investigative and prosecution authorities, against the fact that any remand order is a restriction of a fundamental liberty against a person who has not been convicted of an offence.

B **[89]** His Lordship further held (at p. 326):

Consideration for the reasons for authorising remand cannot be divorced from the question of the purpose of remand envisaged under s. 117. **Section 117 empowers the magistrate to make orders for further remand for the purpose of completing investigations, and not for the purpose of commencing investigations ...** (emphasis added)

C

[90] The plaintiff has thus established that the defendants have breached their statutory duties. It is apt to note that the plaintiff's claim is also heavily premised on the law of tort, particularly, negligence in the context of unlawful detention by police officers, including the failure of the officer to D exercise the level of care and diligence required by law when arresting and detaining an individual. Herein is the summary of my findings discussed above in concluding that the plaintiff has established their case under negligence and breach of common law duty of care:

(i) duty of care

E

Police officers have a duty of care to ensure that their actions are in accordance with the law and respect the rights of individuals. This is undeniably the duties vested upon the defendants as the law enforcement officials, which includes properly identifying suspects, following proper procedures for arrest and detention, and upholding the individual's F rights, including the right to due process (see ss. 117 and 119 of the CPC).

(ii) breach of duty

Negligence occurs when a police officer breaches this duty of care by G failing to follow established procedures or by acting recklessly or carelessly. The first defendant had breached his duties when he failed to initiate an investigation within 24 hours after the second arrest and detention. Not only that, the second defendant's act of failing to inform the plaintiff of his rights to contact his family and engage a lawyer also H amounted to a breach of duty of care. Corroborated evidence showed that the second defendant had failed to investigate or at least verify the plaintiff's explanation or defence of mistaken identity, leading to the wrongful detention of an innocent person. Similarly, the negligence of the first defendant in keying the name of the plaintiff into the wanted list recklessly is an obvious case of beach of duties.

I

(iii) causation

To establish negligence in unlawful detention, it must be shown that the officer's breach of duty was a direct cause of the wrongful detention. In our present case, the second arrest and detention would not have occurred but for the first defendant's negligent for his inaction of leaving the plaintiff's name in the PDRM database when he knew that the plaintiff was not Shukri Rao and was not in any way connected to the offences. Likewise, the plaintiff would not be detained for three days if the first and second defendants had diligently exercised their duties and responsibilities.

(iv) harm and damages

The plaintiff had demonstrated that he suffered harm or damages as a result of the first arrest and detention and the second arrest and detention. The plaintiff's counsel submitted that his client was put into a considerable trouble and inconvenience as he suffered loss and damage, the right of equality before the law, as well as deprived of the right to freedom of movement and the right to earn a living. The plaintiff also claimed that he has suffered humiliation, anxiety and mental anguish, including fear of being arrested and detained by the police.

Breach Of Natural Justice And CPC Provisions

Breach Of Section 117 Read With Section 119 Of The CPC

[91] The plaintiff argued that the first defendant had no grounds to believe that the accusation or information against the plaintiff was well-founded and in the circumstances, he had no basis to seek remand of the plaintiff pursuant to s. 117 of the CPC. The reasons underlaid by the plaintiff are:

(i) from the time of the plaintiff's second arrest and detention until the plaintiff was brought before the Magistrate for remand, the first defendant had not commenced any investigation and so, he would have formed no opinion, belief or ground as to whether the accusation or information against the plaintiff was well-founded;

(ii) the first defendant testified during trial that he cancelled the RJ10A notice on the night of the plaintiff's second arrest and detention without even verifying that the particulars of the arrested person were the right ones. He also candidly confirmed that he did not speak to the arresting officer, the second defendant about the plaintiff's second arrest and detention and so, he would not know himself the grounds in believing that the information against the plaintiff is well-founded. (See NOP, p. 82).

[92] The plaintiff's testimony that the remand order was improperly obtained was not challenged by the defendants. There was no evidence led by the defendants to rebut this. Neither remand minutes nor the first defendant's application for remand was ever produced before this court. The application must be in the first defendant's custody and possession since he was, after all, the maker of the document. This court is of the view that to establish the "reasonable believe", the first defendant should at least show or tender the investigation diary to ascertain whether there were indeed good grounds for believing the accusation or information against the plaintiff and that the remand was necessary so as to conduct further investigation. But he had failed to do so.

[93] Even assuming for a moment that the first defendant had grounds to believe that the accusation or information against the plaintiff is well-founded as claimed by the defendants, the evidence adduced during the trial clearly indicated that the first defendant could not have produced his investigation diary to the Magistrate during the remand proceedings. If he indeed did that, the said Magistrate must have been wilfully and knowingly misled by the first defendant to grant the remand order. This is due to the fact that s. 117 read together with s. 119 of the CPC makes it mandatory for the police officer making the investigation to transmit to the Magistrate a copy of the entries in the diary as prescribed under s. 119 of the CPC when producing a suspect before the Magistrate (see *PP v. Audrey Keong Mei Cheng* [1997] 4 CLJ 702; [1997] 4 AMR 3584).

[94] Section 119 of the CPC stipulates the particulars which must be noted day by day in the diary including the time at which the first defendant began his investigation and a statement of the circumstances ascertained through his investigation. Yet, the first defendant had testified that he did not initiate any investigation in the first 24 hours before taking the plaintiff for remand. Hence, there could be no particular in the diary to justify any remand to begin with.

[95] Moreover, as per the first defendant's testimony during the trial, the Chow Kit report had been fully investigated in 2017 itself, leading to Shukri Rao being charged in court sometime in 2017. (See NOP, 89).

[96] The question then begets, if the investigation into the Chow Kit report had been completed in 2017, what was there to investigate further in 2019, and for the plaintiff's second arrest and detention. What 'further investigation' was there for the first defendant to conduct?

[97] In other words, the plaintiff is challenging whether the "wanted" status of the plaintiff is valid, given that Shukri Rao was previously charged.

[98] Regarding this, it is the defendants' case that Shukri Rao was indeed previously charged. However, the reason why the plaintiff's name still appeared as "wanted" under the identification number used by Shukri Rao

in the PDRM database is because the latter was only released and not acquitted (discharged not amounting to an acquittal) ("DNAA") by the court in the previous case upon the prosecution's request.

[99] This court is aware that in such situation, the Deputy Public Prosecutor can still issue further instructions to the investigating officer for further investigation and subsequently reissue charges against the suspect. (See ss. 254 and 173 of the CPC). This principle can be gleaned from the case of *PP v. Ambika M A Shanmugam* [2021] 2 CLJ 522; [2021] 2 MLJ 723, where Nordin Hassan JCA (as he then was) held:

> [18] … Where the prosecution has instituted against an accused on a charge, *the decision whether or not to prosecute further the accused on the charge is one for the prosecution to make.* Once he has made the decision not to prosecute the accused further, he ought in conformity to that section to inform the court of his decision and s. 184(1) comes into operation. For the purpose of s. 184(2) he ought further to inform the court of all relevant matters, for example, as in this case, the difficulty of tracing a material witness and his intention as to the likelihood of future prosecution of the accused on the charge. *It is then for the court to decide whether it should direct that the discharge shall amount to an acquittal. The court is vested with the discretion is, in my opinion, unfettered; but, of course, it must be exercised judicially, taking into consideration all the relevant facts and factors placed before it, including the intention of the public prosecutor as to the future prosecution of the accused on the charge.* That, in substance, is how the section operates. (emphasis added)

[100] Therefore, Shukri Rao could still be listed in the "wanted" system for recharging, and this does not constitute double jeopardy because the first charge was only DNAA and not acquitted and discharged ("AND"). The suspect, named Shukri Rao, can be charged again at any time after a complete investigation.

[101] However, in this case, unfortunately, it was the plaintiff's name which was entered into the system instead of the name of Shukri Rao. This has deprived the plaintiff's liberty as a freeman and tarnished his reputation within the ambit of the society.

[102] In fact, the first defendant testified vaguely during cross-examination that the three-day remand was applied to further investigate "wanted offence". However, he has failed to answer most of the cross-examination questions put to him regarding this. (See NOP, pp. 135 and 136).

[103] *In Re Syed Mohammad Syed Isa & Ors* [2001] 8 CLJ 247; [2001] 3 AMR 3769, Abdul Wahab Patail J (as he then was) had this to say at p. 253 (CLJ); p. 3778 (AMR):

> It is necessary to understand clearly the purpose of a remand in order to be able to balance fairly between the right of personal liberty and the public interest that offenders be apprehended and brought to justice, it was held in *Hashim bin Saud v. Yahya bin Hashim & Anor* [1977] 2 MLJ 116 (262E-right) that the purpose of the application for remand is to enable

A the police to complete the investigation. *Stating in an application that the remand applied for is to enable the police to complete investigations is not sufficient. This purpose for the application is often confused with, but is quite distinct from, the reasons or grounds to support the application for remand in order to serve that purpose.* (emphasis added)

B **[104]** Applying the above principle to our case herein, the mere reason of "for further investigation" is not sufficient to justify the remand order. What it appears to me is an obvious case of lackadaisical attitude.

[105] The plaintiff premised, and I agree, that no Magistrate, having the right information that the first defendant had not commenced any C investigation in the first 24 hours coupled with the fact that the investigation into the Chow Kit report had already completed in 2017 and there was no issue of either the plaintiff absconding or interfering with the investigation, would have granted the three-day remand order pursuant to s. 117 of the CPC.

D **[106]** With regard to the investigating officer's duties when applying for remand, I refer to the Court of Appeal case in *Mohd Hady Ya'akop v. Hassan Marsom & Ors* [2017] 6 CLJ 487; [2016] 4 MLJ 141, where Varghese George JCA held that:

E [36] What could be drawn from the above discussion was that a police officer applying for a remand (detention order for further investigation) had a duty to satisfy the magistrate that there were grounds for believing based on credible information that the person arrested was involved in a criminal offence and such investigation could not be completed within twenty four hours; the accusations must be well-founded. What this F meant in other words, was that it was the responsibility of such police officer to produce to the magistrate sufficient material that would pass an objective test to show at least the existence of a reasonable basis for the alleged suspicion to justify the remand order to be issued by the magistrate. *The entries in the police diaries that had to be produced when applying for the remand order or extension should also advert to the stage and developments* G *in the investigation under way to support the sufficient cause* upon which the magistrate would thereupon have to make the far reaching decision to deny one's liberty for that limited period.

…

[42] Although we might not go so far as to say that the police had wilfully H deceived the magistrate or obtained those orders on a 'lie' (as argued by counsel), it was nevertheless abundantly clear that there was dereliction of duty and obligations bordering on gross irresponsibility on the part of the third and fourth respondents as police officers when applying for those remand orders from the magistrate. It could not be gainsaid that the first remand order was obtained by the police from the magistrate I without having adduced to the court through the arresting officer (or at the least being able to identify the arresting officer) relevant material to ground reasonable suspicion or other sound basis to detain the appellant.

> In so far as the extension order was concerned, what was beyond any dispute from the record, was that there was here suppression of a material development in the investigations at that stage, namely that the appellant's story that he was not at the scene of the fight had by then been verified and confirmed by the police; there was therefore no basis for any further detention of the appellant. (emphasis added)

[107] Hence, it was the responsibility of the first defendant as the IO to produce to the Magistrate sufficient material to show his reasonable basis to justify the remand order.

[108] For the fear of repeating, it was openly testified by the first defendant that he had not commenced any investigation within the first 24 hours. He also did not meet the plaintiff before taking him to the Magistrate for remand. He did not check the Chow Kit IP to verify whether the plaintiff was the right suspect in the Chow Kit report. Most alarming of all was the fact that the plaintiff was not permitted to seek legal representation and consultation either before, during or after the remand proceeding, a fact which was not challenged by the defendants during trial. Numerous breaches of duties and statutory duties have clearly been committed here.

[109] More intrudingly, the plaintiff further revealed that the first defendant had utilised two different judicial detention processes concurrently to keep the plaintiff detained in the police custody for three days. The evidence elicited from the first defendant during cross-examination demonstrated that sometime after the first defendant had obtained the remand order from the first Magistrate, the first defendant proceeded to obtain from a different Magistrate, a waran menahan (p. 33 of encl. 55) for the plaintiff, Thayanantha Rao a/l Bala Krishna be imprisoned until 13 May 2019. (See NOP, p. 151).

JR Siapa yang pohon waran ini?

SD2 Saya yang pohon.

JR Mana nama Sarjan di sana.

SD2 Tidak tertera dalam.

JR Jadi, macam mana kita boleh tahu?

SD2 Melalui permohonan reman.

JR Sarjan, anda tahu tak apa waran menahan?

SD2 Tahu.

JR Tahu. Apa dia?

SD2 Untuk menahan reman seseorang mereka atas kesalahan yang dilakukan.

JR Apakah kandungan waran tersebut?

SD2 Tempoh hari untuk ditahan.

[110] The plaintiff's counsel questioned and challenged the motive and the need in doing so. This clearly was a complete abuse of power and *mala fide* action on the part of the first defendant. It is to be noted that *mala fide* does not mean at all a malicious intention. It normally means that a power is exercised for a collateral or ulterior purpose, *ie*, for a purpose other than the purpose for which it is professed to have been exercised (see *Karpal Singh Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1988] 1 MLJ 468).

[111] The plaintiff asserted that the first defendant's conduct and action, that is to mislead the Magistrate hearing the remand application to grant a remand order and then to go to another Magistrate (on the same day) to obtain waran menahan were both devious and underhanded. The first defendant had so conducted himself even though the facts in this case show that he knew that the police investigation into the Chow Kit report against Shukri Rao was completed in 2017 and, according to his own testimony during trial, all that was left for him to do, as far as the Chow Kit IP is concerned, was to charge the suspect.

[112] The plaintiff premised that there was no purpose for the plaintiff to be remanded and detained under a waran menahan for three days, if the only purpose was to charge him in court on Monday. Was there a valid and reasonable cause to fear that the plaintiff would abscond if he was released and that he would not attend the court on Monday for him to be charged? If so, what was this fear based on? This has never been answered by the first defendant. After all, the first defendant testified that Shukri Rao did not abscond during court proceedings in 2017 and it was the Magistrate's Court that issued the discharge not amounting to acquittal (DNAA) of Shukri Rao. (See NOP, p. 131).

[113] In *Dasthigeer* (*supra*), His Lordship Abdul Wahab Patail J at p. 328 of the case, had clearly articulated that if attendance in court to be charged is the only consideration, then in the absence of any reasonable belief that he might abscond, the person could be released on police bail under s. 29 of the CPC.

[114] Hence, it is my view that unless there were good and valid grounds for the first defendant to believe that the plaintiff must be kept in police detention as he would otherwise interfere with the police investigation or alternatively that he might abscond, there were simply no plausible grounds for the plaintiff to be kept in the police lockup for three days and for a remand order and (more so) for a waran menahan to be taken and issued against the plaintiff.

[115] As alluded by the judgment in *Dasthigeer* (*supra*), s. 29 of the CPC could have been utilised to release the suspect on police bail, with or without conditions/guarantors, to make certain that the plaintiff be present in court on Monday. Yet, this was not done by the first defendant.

[116] The first defendant undeniably had the power to release the plaintiff on police bail if the investigation were still ongoing and if it was necessary under all circumstances of the case, but he chose not to. I am, therefore, in full agreement with the plaintiff that this was an abuse of power which leads to the infringement of the plaintiff's right to liberty.

Breach Of Natural Justice

[117] According to the plaintiff's counsel, his client was denied the right to be heard, to explain to the Magistrate that this was a case of mistaken identity and that he was not involved in any offence stated in the Chow Kit report (see PWS1, p. 7). The plaintiff's testimony that he was denied the opportunity to speak during the remand proceedings was never challenged in the cross-examination. Hence, the plaintiff submitted that this tantamount to an acceptance of the witness's testimony.

Breach Of Section 29 And/Or Section 388(2) Of The CPC

[118] It is undisputed that the plaintiff was released and maintained under police bail from 13 May 2019 until the time of my decision since the police bail has never been revoked. It has been four years since then. It is the plaintiff's case that the first and third defendants had no basis in law to release and keep the plaintiff on police bail as there were no sufficient grounds for further inquiry or investigation.

[119] The first defendant had on 13 May 2019 checked the Chow Kit IP and therefore he would have known that the plaintiff was not the right suspect since Shukri Rao's photograph (taken in 2017) would be in the said Chow Kit IP. (See NOP, p. 127).

JR Dan selepas itulah, anda telah mendapat arahan selepas anda melaporkan kepada pegawai atasan untuk lepaskan beliau atau jaminan polis?

SD2 Setuju.

JR Dan dalam kes ini, Sarjan, selama kita berbalik kepada isu reman nanti ya. Bilakah anda telah mendapat kertas siasatan 2017 kembali ke tangan anda?

SD2 Hari 13 haribulan.

JR Jadi setuju sekiranya kertas siasatan itu diperolehi serta merta tak perlu kita memasuki proses reman sampai kita sampai ke perkarangan bilik Mahkamah, setuju?

SD2 Macam, ulang semula.

JR Sekiranya anda telah mendapatkan kertas siasatan secepat mungkin pada hari yang sama atau sekurang-kurangnya selang sehari, kita tak mungkin akan berada di mahkamah hari ini.

SD2 Setuju.

JR **Kerana tentu anda akan sedar dan pasti sedar orang yang ada di hadapan anda bukanlah suspek mengikut siasatan anda pada tahun 2017, setuju?**

SD2 Setuju. (emphasis added)

[120] Besides the documents showing the issue of mistaken identity, during the trial, the first defendant had testified that he also went to the National Registration Department on 13 May 2019 to verify the plaintiff's fingerprints against the JPN's record, where he was told by JPN that "tiada rekod dijumpai" (see p. 60 of B1). Hence, what was the rationale for releasing the plaintiff on police bail when he already knew with 100% certainty that the plaintiff was not the suspect for the Chow Kit report?

[121] Even more alarming (again) is the fact that the first defendant, in his testimony during cross-examination (see NOP, pp. 141 to 143), had testified that after he found out himself that the plaintiff was not Shukri Rao on 13 May 2019, he updated his superior, the third defendant, on the facts of the case and for the plaintiff to be released on police bail. The third defendant had in turn informed the fourth defendant, who in turn approved the same. (See NOP, pp. 141 to 143).

[122] Despite knowing that the plaintiff was not involved in the Chow Kit report and that the plaintiff had been wrongly arrested, the defendants, for unknown reasons, took extraordinary and gratuitous action to release the plaintiff on bail, which continued until this decision.

[123] With respect, this court is of the view that the first defendant's act to hide behind his uniform to say "my superiors told me" or "I was acting under orders" is not acceptable, for a police officer must be accountable for his actions. If at all the defendants are serious about this, they must call this/these superior(s) who had given that order to testify and explain during this trial. This court and the public deserve to know the logical reason from such superior(s) for such illogical order.

[124] Besides, I also take note of the first defendant's attitude and demeanour when answering questions which demonstrated high-handedness as well as his arrogance and disregard of the plaintiff's rights as the detainee. It is most unfortunate that such mindset of the police still exists in the new millennium!

[125] In defence, the defendants have sought to argue that they have not breached the plaintiff's constitutional rights and submitted that the plaintiff had failed to challenge his detention in any High Court or appeal against the decision of the Magistrate in relation to the remand order.

[126] The second defendant testified that he made a telephone call to conduct a criminal record check with the Dang Wangi IPD Control Centre. The results of the check revealed that the plaintiff's identification number had eight previous records. The plaintiff also has one outstanding record related to the Chow Kit report 5332/17 for a drug-related offence. The defendants argued that the mere existence of the report itself is sufficient evidence that the requirements for detention have been met.

[127] The test to determine whether the arrest was reasonable depends on whether the defendants at that time had reliable information and reasonable suspicion to cause the arrest. Therefore, the defendants alleged that the arrest made against the first defendant in this case is lawful under the provisions of s. 23(1) of the CPC, as the conditions for a valid arrest, including having reliable information and reasonable suspicion, have been met.

[128] Regarding the issue of the plaintiff's identity, it is argued that, based on the information report obtained by the second defendant during the arrest, no photograph was provided to the second defendant. The arrest was made through a telephone call, and the second defendant has clarified that his duty was only based on the information received. It is the responsibility of the investigating officer to ensure that the person detained is the actual wanted individual or not.

[129] Further, the defendants also argued that the police officers who are executing a remand order or warrant issued by a Magistrate are provided with protection from civil action while carrying out investigations against the plaintiff. This protection is specified under sub-s. 32(1) of the Police Act 1967.

[130] The plaintiff refuted this by referring to the recent case of *Rahaya Salleh v. Nik Mohd Ghazali Nik Zul Azhar & Ors And Another Appeal* [2022] 8 CLJ 591; [2022] 5 MLRA 280. Ahmad Nasfy JCA has succinctly held that:

> [44] … **In Malaysia, neither the police nor the prison authorities enjoy immunity from a civil claim for negligence.** So too the personnel in the discharge of their duties. Cases on this point are aplenty and there is no necessity for us to state them. It is plain as pikestaff or as night follows day. (emphasis added)

[131] Thus, the defendants could not conveniently shield their wrongdoings under the Police Act 1967. As public officers, they must be accountable for all their wrongful acts, deeds and negligence and compensate their tortious victims who have suffered losses accordingly.

A **Misfeasance In Public Office**

[132] The defendants submitted that the plaintiff had failed to specifically plead the particulars of the alleged misfeasance in public office and also what were the first and second defendants' acts of *mala fide*. The defendants further submitted that the plaintiff failed to plead and prove the damage and loss
B suffered.

[133] In response, the plaintiff asserted that the plaintiff's statement of claim has laid out, with sufficient particularity the details of misfeasance in public office as well as the loss and damage suffered by the plaintiff.

C **[134]** In *Tony Pua Kiam Wee v. Government Of Malaysia & Another Appeal* [2020] 1 CLJ 337; [2019] 12 MLJ 1, the apex court had instructively considered the development of the tort of misfeasance in public office:

> [76] The development of misfeasance in public office and its role in the general scheme of tort law was considered by the House of Lords in the
D leading case of *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1. The tort is founded on the unifying element of abuse of public power in bad faith (at 191-192). Lord Steyn explained the rationale of the tort (at 190, 192):
>
> > The rationale of the tort is that in a legal system based on the rule
> E of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes: *Jones v. Swansea City Council* [1990] 1 WLR 54, 85F, per Nourse LJ ... The basis for the action lies in the defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals.

F **[135]** As to the issue of what is "public office", Nallini Pathmanathan FCJ in *Tony Pua* (*supra*) quoted as follows:

> [80] It is only in view of the rationale and basis of the tort of misfeasance that the proper scope of "public officer" can be determined. The classic description of "public officer" in the context of misfeasance is the passage
G of Best CJ in the early case of *Henly v. Lyme Corporation* (1828) 5 Bing 91 (at 107-8, quoted with approval by the High Court of Australia in *Northern Territory of Australia v. Mengel* (1995) 129 ALR 1):
>
> > *Then, what constitutes a public officer? In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation in*
> H *whatever shape, whether from the crown or otherwise, is constituted a public officer.* (emphasis added)

[136] The first to sixth defendants were all police officers, holding public office and were employed by the seventh defendant. Hence, the plaintiff submitted that the first to sixth defendants fall under the definition of "public
I officer" and the fact that they were exercising their powers for a public purpose is indisputable.

[137] The issue that falls to be determined by this court then, as stated by the High Court in *Asia Pacific Higher Learning Sdn Bhd v. Majlis Perubatan Malaysia & Anor* [2020] 2 CLJ 346; [2020] 7 MLJ 549 is whether each of the defendants had the state of mind to harm the plaintiff, that is to say, either targeted malice specifically intended to injure the plaintiff or knowledge by the public officer that he has no power to carry the act complained of and that the act will injure the plaintiff bad faith arises in because the officer does not have honest belief that his act is lawful.

[138] The plaintiff relied heavily on the judgment in *Abdul Ghani Haroon* (*supra*), where the applicants were arrested under s. 73 of the Internal Security Act 1960. The applicants' detention was extended twice and the police had denied family members, lawyers and members of SUHAKAM access to the applicants after which, a writ of *habeas corpus* was filed. The court had to consider whether the applicants were unlawfully detained and in deciding that the detention was unlawful, Mohd Hishamudin J (as he then was) stated *inter alia*:

(i) the detention was *mala fide* by reason of deliberate and unreasonable denial of access to family members;

(ii) the detention was *mala fide* by reason of deliberately and unreasonably denying access to lawyers by the respondent. "Such denial was not only cruel, inhuman and oppressive, it is also a blatant violation of the applicant's constitutional rights under art. 5(3) of the Constitution" (see p. 704 para. F, p. 706 para. B).

[139] To hark back to the facts in our case herein, the plaintiff claimed that his right to notify his family and to seek legal representation after his arrest and before the remand order had been granted was denied. Furthermore, the first, second and fourth defendants had full knowledge that the plaintiff was not the correct suspect in the Chow Kit report, yet they failed to unconditionally release the plaintiff on 13 May 2019 and had released and kept the plaintiff on police bail instead, for the past four years.

[140] The first to sixth defendants were empowered by the position that they held to arrest and keep in detention the plaintiff and the exercise of such power should not have been exercised in excess and/or disregarded altogether. The plaintiff submitted that the first to sixth defendants had abhorrently and egregiously violated legal safeguards in the exercise of their public duties for they had misused their powers for a different purpose, at all material times, conscious that in doing so, the plaintiff could be injured/harmed. The plaintiff's first arrest and detention and second arrest and detention could have been avoided altogether if only the defendants had properly and diligently carried out their public duties.

[141] This was unequivocally admitted by SP1, who presently holds the position of Ketua Urusetia Ketua Polis Negara Perundangan Polis Bukit Aman. In fact, after the filing of this action and before the commencement of the trial, and after years of writing to seek action by the police to clear his good name, it was SP1 who stepped in and replied to the plaintiff's counsel in 2021 admitting and acknowledging that indeed the plaintiff's IC number has been exploited by Shukri Rao. Together with this frank disclosure, SP1 also stated in the letter that the police had since deleted the criminal record of Shukri Rao in the PDRM database, and ratified the details of numerous police reports (enclosure 55, pp. 100 to 101).

[142] During trial, SP1 was candid to testify that if steps had been taken at the material time in 2017 to correct the errors in the PDRM database, the plaintiff would not have to endure the second arrest and detention. (See NOP, pp. 40 and 41).

JR Tuan Rahman, kita tahu dokumen-dokumen ini menyokong surat Tuan bertarikh 12.1.2021 bahawa ada identiti salah. Soalan terakhir saya – as a very senior ranking police officer, **adakah kenyataan saya betul sekiranya isu ini diperbetulkan pada tahun 2017, anakguam saya tidak akan mengharungi tangkapan pada 2019?**

SP1 **YA, saya harus bersetuju dengan pihak Plaintif.** Saya ada buat pertanyaan tentang rekod daripada D2 dan D4 mengesahkan bahawa inilah sahaja rekod yang masih tinggal dengan mereka. As far as cap jari, tak ada apa langsung. As far as D4, hanya yang dicatitkan berkenaan Plaintif sahaja, yang lain telah dipadam.

JR Soalan saya sekali lagi Tuan – if these has been rectified in 2017, we would not be in Court today?

SP1 YA, saya setuju. (emphasis added)

[143] To sum up, it is clear that the plaintiff has also established on the balance of probabilities that the tort of misfeasance in public office has also been committed by the defendants through their handling of this case, which has caused the unfortunate suffering of the plaintiff.

Conclusion

[144] Based on the above, I find that the plaintiff has shown that the defendants have committed numerous tortious wrongs against the plaintiff and that the defendants' conduct, especially those of the first defendant, has deprived the plaintiff of his constitutional right. However, in view that, during the trial, the defendants have ratified the mistake in the PDRM database and the plaintiff and his identity card number is no longer mistaken for and/or associated with Shukri Rao, I do not see any need for the injunction sought. Hence, this court allows the plaintiff's claim with cost and, as per the prayers, order the following:

(i) a declaration that the remand order dated 11 May 2019 was wrongfully obtained by the defendants without sufficient cause;

(ii) a declaration that the police bail granted on 13 May 2019 to the plaintiff was unlawful;

(iii) a declaration that the plaintiff's constitutional rights were infringed; and

(iv) global damages of RM250,000.